Michigan Law Review

Volume 61 | Issue 6

1963

The *Engel* Case from a Swiss Perspective

F. William O'Brien
Universite de Fribourg, Fribourg, Suisse

THE *ENGEL* CASE FROM A SWISS PERSPECTIVE

*F. William O'Brien**

On June 25, 1962, the Supreme Court of the United States held that the State of New York, by using its public school system to encourage recitation of a prayer during classroom hours, had adopted a practice wholly inconsistent with that clause of the first amendment, applicable to the states by virtue of the fourteenth amendment, which prohibits laws respecting an establishment of religion.[1] The opinion of the Court, written by Mr. Justice Black for himself and four other Justices, is interesting in that he rests the Court's decision exclusively upon the establishment clause. In previous decisions,[2] the Court had not stated clearly that state action in contravention of this provision of the first amendment would fall under its ban even though religious freedom might be unimpaired. The present Court has now made this point clear beyond doubt.[3]

In the ensuing pages, the *Engel* decision will be surveyed from the unique vantage point of the Swiss terrain. Such a study in comparative law hopefully facilitates an interchange of ideas among the peoples of various countries on how to handle common problems. For Americans, the experience of the Swiss with problems in the area of church-state relations would seem to be of unusual value. Switzerland is a country with a long history of various types of state churches. To this day established religions exist in most of its cantons. Nonetheless, the cantonal constitutions as well as that of the Swiss Confederation are replete with

* Professeur de Droit Constitutionnel, Université de Fribourg, Fribourg, Suisse; formerly at Georgetown University.—Ed.

1 Engel v. Vitale, 370 U.S. 421 (1962).

2 In Cantwell v. Connecticut, 310 U.S. 296 (1940), where the Court first "incorporated" the establishment clause, religious freedom was the major issue. In McCollum v. Board of Educ., 333 U.S. 203 (1948), the question of religious liberty was not pressed and the Court's opinion is cloudy, but it appears that the Court perceived at least some element of restraint. As for Mrs. McCollum's original position, see McCollum v. Board of Educ., 396 Ill. 14, 23, 71 N.E.2d 161, 165 (1947); Records of the Proceedings of the Circuit Court of Champaign County 190-216, 231. These records demonstrate clearly that she did not claim an infringement of religious freedom. Like many others, Mr. Justice Reed pointed out the lack of clarity in the opinions of his brethren on the bench, stating: "I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional." McCollum v. Board of Educ., 333 U.S. 203, 240 (1948) (Reed, J., dissenting).

3 Engel v. Vitale, 370 U.S. 421, 430-31 (1962). Mr. Justice Douglas stated explicitly that "there is no element of compulsion or coercion in New York's regulation." *Id.* at 438 (Douglas, J., concurring). Mr. Justice Stewart wrote that "the Court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion." *Id.* at 445 (Stewart, J., dissenting).

clauses protecting religious liberty. And the manner in which the Swiss guard religious freedom while maintaining officially established churches should prove of interest to American students of the *Engel* decision. An additional reason recommending the present study is that the political institutions of Switzerland and the democratic instincts of its citizens are remarkably similar to those characteristic of the Anglo-American tradition.[4] Deserving special notice is the federal structure of its government, which was adopted in 1848 after a careful examination of the features of the federal system established by the Constitution of the United States.

For many others who have discussed the *Engel* case, to pray or not to pray—that is the question. For this writer, the prime question is one involving the nature of federalism. The decision not to provide for public prayers in certain schools where religious tensions are high and where agreement on formula is difficult would indeed be the better part of wisdom. But the question of who should make this decision, and upon what grounds, is of the greatest importance. In discussing the willingness of the Supreme Court to accept this responsibility in analogous circumstances, Professor Corwin wrote prophetically in 1948 that "this may in the long run prove to be its [the case's] most important phase."[5] In this regard, a study of how the problems presented in *Engel v. Vitale* would be disposed of in Switzerland, within the framework of its federal system of government, and with its emphasis on democracy and liberty, notwithstanding the multitude of official churches in its cantons, should prove enlightening.[6]

4 BRYCE, MODERN DEMOCRACIES 327 (1921); CODDING, THE FEDERAL GOVERNMENT OF SWITZERLAND 55 (1961); MOORE, MODERN CONSTITUTIONS 241 (1957).

5 Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 9 (1948).

6 This article does not concern itself with the mass of historical events responsible for these various church-state arrangements. Nor does it include in its compass the many philosophical and theological traditions which conditioned them. Those interested in ascertaining similarities between the Swiss and the American traditions may find satisfaction in comparing the theocracy founded by John Calvin in Geneva in 1536 with the early New England theocracies, directly traceable to Calvin's influence. In referring to the American experience, this author prescinds from *why* or *how* religious establishments or separation happened to exist in the various states in 1789. The article treats solely the provisions written into the Constitution in response to the factual situation then obtaining. Readers who care to deal with the enormously complicated study of the theological and philosophical thought that went into—and came out of—these church-state arrangements in the two countries are referred to the following, *inter alia*: ANDERSON, JACOBSON'S DEVELOPMENT OF AMERICAN POLITICAL THOUGHT 1-71 (2d ed. 1960); BEARD, BASIC HISTORY OF THE UNITED STATES 14-23 (1944); 3 DIERAUER, HISTOIRE DE LA CONFÉDÉRATION DE LA SUISSE 17-651 (1910); 5 *id.* 738-935; GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT *passim* (1940); PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1930); Morison, *The Puritan Tradition*, in UNDERSTANDING THE AMERICAN PAST 67-79 (Saveth ed. 1954); Bridenbaugh, *The Virginians*, in *id.* 80-93.

In Switzerland the word "establishment" is found neither in the federal constitution nor in the constitution of any of the twenty-five cantons and half-cantons. Nonetheless, students of Swiss institutions agree that the majority of cantons do have officially established churches.[7] Practically, the central government can recognize no one particular religion, but the federal constitution guarantees to the cantons the right to maintain their own state churches or to introduce "separation" should they desire. This guarantee is found in article 3 which provides: "The Cantons are sovereign as far as their sovereignty is not limited by the Federal Constitution, and as such they exercise all the rights which are not delegated to the federal power."[8]

It was by virtue of this provision that the highest federal organs with jurisdiction in the matter have ruled that the central government may make no laws respecting the establishment of religion in the cantons. In 1878 the Conseil Fédéral, the federal executive body, consisting of seven members, elected by the National Assembly, held: "The Cantons have, by the Federal Constitution, the power to regulate as they judge proper the external relations between the State and the different churches existing on their territory . . . ."[9] In 1929 the Tribunal Fédéral—the "Supreme Court" of Switzerland—stated explicitly that there was no prohibition in the Constitution against the establishment of state churches by the cantons and that this did not as such violate religious liberty.[10] All authorities admit that this power flows directly from cantonal sovereignty as protected from federal invasion by article 3. A renowned scholar included this remark in an address at the University of Lausanne in 1962:

> "The principle of our federal state is to reserve to its members, the cantons, sovereignty in those domains where power ought to be held as close as possible to one's person and conscience. These sacredly reserved domains are: that of public education, that of church-state relations, that of the minority tongues."[11]

7 CODDING, *op. cit. supra* note 4, at 53; HUGHES, THE FEDERAL CONSTITUTION OF SWITZERLAND 63 (1954).

8 Note the similarity of the language of the tenth amendment to the Constitution of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

9 FEUILLE FÉDÉRALE IV, 404 (1878) [hereinafter cited as F.F.]. The Conseil Fédéral hears many appeals which in the United States would go to the courts.

10 Römisch-Katholiche Kirchgemeinde Buren v. Regierungsrat Solthurn, RECUEIL OFFICIEL DES ARRÊTS DU TRIBUNAL FÉDÉRAL 55, I, 113, 129 (1929).

11 Address of Professor Gonzague de Reynold, printed in Fribourg's La Liberté, Aug. 1, 1962, p. 1, col. 2.

George Sauser-Hall, whose book *Guide Politique Suisse* is a vade mecum in Switzerland, has written:

> "Thus the cantons have the power to regulate as they please the relations of the churches with the State. . . . Most of the Swiss cantons have adopted the system of *State Churches* where the State recognizes that one or several Churches are those of the majority of its inhabitants. It organizes these Churches, subsidizes them or maintains them completely, and accords them certain privileges which it refuses to the other faiths. The official Churches thus bear the name of national Churches. This is the system which is in effect in most of the Protestant cantons and in a great number of the Catholic cantons."[12]

Enough has now been said to suggest that, if a situation such as that presented in the *Engel* case arose in Switzerland, the grounds for solution would be quite different from that upon which the Supreme Court rested its decision. But, although the "establishment" argument could not be invoked, there are several other provisions in the Swiss federal constitution that are relevant. Article 27 provides, in paragraph three, that "the public schools shall be such that they may be attended by adherents of all religious sects without any offense to their freedom of conscience or belief." Paragraphs one and two of article 49 stipulate: "Freedom of conscience and belief is inviolable. . . . No one may be compelled to be a member of a religious association, to receive a religious education, to take part in a religious ceremony, or to suffer punishment of any sort by reason of religious opinion."

Before considering how the above guarantees would be applied to a set of facts such as those presented in the *Engel* case, it is interesting to note that the Swiss courts are totally excluded from handling questions regarding the operation of the public school system. Article 125 of the Federal Law on Organization of the Judiciary provides that appeals from the cantons on questions involving paragraphs two and three of article 27 must be made to the Conseil Fédéral. Article 132 provides for appeals to the Assembly from decisions of the Conseil Fédéral. It should be noted here that the Tribunal Fédéral does not possess the power of judicial review and therefore it cannot nullify acts of the other organs of the central government.[13] Nor does any cantonal court,

12 SAUSER-HALL, GUIDE POLITIQUE SUISSE 136-37 (16th ed. 1955).

13 In 1939 an attempt by popular initiative to invest the Tribunal Fédéral with such authority was decisively turned back. CODDING, *op. cit. supra* note 4, at 112; SAUSER-HALL, *op. cit. supra* note 12, at 164.

save that of Geneva, exercise this prerogative vis-à-vis its executive or legislative departments. Thus, irrespective of what other constitutional provisions may be involved, the question is foreclosed to decision by the judiciary if it concerns the schools. The Conseil Fédéral stated, in 1888:

> "One can only maintain that in reserving to the Conseil Fédéral recognition of appeals under Article 27 of the Federal Constitution, the Federal Law on Organization of the Judiciary desired to entrust it with the judging of all appeals whatsoever on school affairs whatsoever be the constitutional provision which is violated."[14]

But even the Conseil Fédéral and the Assembly enjoy only limited authority in school matters. Article 27 speaks only of "primary schools," and, consequently, secondary and university education is exclusively under the control of the cantons.[15] Six of the seven universities in Switzerland are designated as Protestant, inasmuch as their faculties of theology are Protestant. The seventh has a Catholic faculty of theology. No one would ever contest the right of the cantons so to organize their universities.[16] On their right to establish secondary schools without regard to the demands of article 27, the Conseil Fédéral ruled in 1877 that "secondary education is entirely under the power of the cantons. . . . Consequently, we have declared that the appeal is groundless in that which concerns the points dealing with Article 27, paragraphs two and three, of the Federal Constitution."[17] This ruling was reiterated in 1897 in a case which involved the establishment of a public secondary school under the direction of religious sisters.[18]

14 F.F. III, 755 (1888).

15 F.F. IV, 615, 648 (1897); F.F. 258 (1877); F.F. II, 84, 86 (1878). In the last case, the Conseil Fédéral allowed itself to inquire into whether the school involved was really a secondary school and not merely a primary school in disguise so as to escape the demands of article 27. Satisfied on this score, it refused to hear the substantive question for want of jurisdiction.

16 How does this arrangement comport with article 4 of the Swiss Constitution, which reads: "All Swiss are equal before the Law"? Compare Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938), where the Supreme Court of the United States, applying the equal protection clause of the fourteenth amendment, ruled that "the State was bound to furnish him [the Negro applicant] *within its borders* facilities for legal education substantially equal to those which the State there afforded for persons of the white race." (Emphasis added.)

17 F.F. 258 (1877). Paragraph two reads: "The Cantons provide for adequate primary education, which shall be exclusively under the control of the civil authority. Such education is compulsory and, in the public schools, free."

18 F.F. IV, 615, 648 (1896). Since paragraph three of article 27 speaks only of public schools, unqualifiedly, the Conseil Fédéral has ruled at least once that the "liberty of conscience" provision therein is not so restricted. F.F. II, 733 (1882). See also Marti, *Liberté de Croyance et des Cultes*, in FICHE JURIDIQUE SUISSE 1071, at 3 (1950).

In speaking of the jurisdiction of the Confederation in school matters, it should be pointed out that the Conseil Fédéral has only the indirect power of surveillance activated in individual cases which come by way of appeal. Paragraph four of article 27 states that "the confederation shall take the necessary measures against Cantons which fail to fulfill these obligations [mentioned in paragraphs one through three]." Judging that this permitted the central government to legislate for the schools, the Assembly in 1882 authorized an official examination of education policies and practices in the cantons, preparatory to the subsequent enactment of enforcement laws.[19] But, fearful of this first step into jealously guarded territory, the Swiss people seized a constitutional weapon afforded them in the optional referendum provided by article 121, and defeated the decree of the Assembly by popular vote.[20] This ended efforts at direct federal control.

Enough has now been said concerning the restricted jurisdiction of the Confederation in school matters to consider the answers which would be given in Switzerland to plaintiffs with grievances such as those alleged in *Engel v. Vitale*. At the outset, it can safely be said that in most, if not in all, Swiss schools religious instruction is given; in a very large number of schools, prayers are recited. The following constitutes a mere sampling from a few cantons.

The public schools in the Protestant canton of Vaud, where the National Evangelical Reformed Church is designated as the state religion in article 13 of the cantonal constitution, give religious instruction in accordance with article 18 of its constitution,

19 5 SALIS, LE DROIT FÉDÉRAL SUISSE 598-610 (1907). In his report on the need for such federal laws, the Chief of the Department of the Interior made the following remarks: "Indeed, if the Confederation is not able to have the orders it gives carried out, if need be by force, it were better not to give those orders, which can only weaken its authority when unfulfilled. . . . It can hardly think seriously of decreeing penal prescriptions against the unconstitutional conduct of a school teacher, when, for instance, if he expresses himself, from a religious point of view, in an aggressive manner offending liberty of conscience and belief. No more can it send troops, as a form of punishment, into a canton or commune on the grounds that the demands of Article 27 are not being observed, especially if the dispute has its source in the domain of religion and faith. But, even supposing that the Confederation were able, in a given case, to achieve its ends by coercion, it would have to ask itself, at the outset, if the evil which results from violence inflicted on an entire population would not be more considerable than the evil which it desires to remedy. In school questions, as a general thesis, . . . not much is gained by force." *Id.* at 601. The department chief concluded that the best means to awaken laggard cantons to their constitutional responsibilities would be enlightened public opinion plus the nudge of federal subsidies. *Id.* at 602. But when the subsidy law of 1903 was passed, it guaranteed that francs would not be used as a means of coercion. Accordingly, the cantons dispense their federal stipends as they please. 4 RECUEIL SYSTÉMATIQUE DES LOIS ET ORDONNANCES 9 (art. V) (1848-1947).

20 HUGHES, *op. cit. supra* note 7, at 28.

which provides: "In the public schools, religious instruction ought to be conformed to the principles of Christianity and distinct from other branches of learning."[21] A special school law provides that "school is opened by a prayer or by a hymn, or by a reading or in any other educational manner, after which the instructor lists immediately the absences in the school registry."[22] In Geneva, the one canton in which complete separation of church and state is said to prevail,[23] religious instruction is permitted according to article 137 of its constitution.[24] The constitution of the Protestant canton of Neuchâtel contains, in article 71, the following provision: "Religious instruction is given freely in the public schools under the care of the recognized Churches; for this purpose, the local schools are furnished gratuitously and favorable hours are reserved." In article 17 of the constitution of the canton of Fribourg, in which Catholics account for eighty-seven percent of the population, there is a stipulation that the schools shall be "organized with a religious and patriotic direction," and that "in this matter there be effective co-operation assured to the clergy." In accordance with these provisions, Bible instruction is offered, generally by a layman on the ordinary faculty, and church doctrine is taught by the Protestant pastor or by the Catholic curé.[25] The official *Introduction au Plan d'Études* for Fribourg schools is silent as to matters relating to religious instruction, in contrast to the official manual used for the Vaud schools which details the aims and contents of the course in religion and Bible.[26] This silence is attributable to the theory that, although the state should cooperate with religious groups, the churches themselves should be entirely free as to their teaching as well as to their own internal organization. Prayers are said in the Fribourg schools, but participation is purely optional, and discretion

21 This religion course is detailed in the official PLAN D'ETUDES ET INSTRUCTIONS GÉNÉRALES POUR LES ECOLES ENFANTINES ET LES ECOLES PRIMAIRES DU CANTON DE VAUD 18-21 (1960). Participation in the course is completely optional.

22 RÈGLEMENT SCOLAIRE art. 281. Confirmed by letter to this writer, Aug. 6, 1962, from Le Chef du Service de l'Enseignement Primaire, Lausanne, Vaud.

23 SAUSER-HALL, *op. cit. supra* note 12, at 164.

24 Also by article 18 de la loi sur l'instruction publique (Nov. 6, 1940). This article provides that the instruction is to be optional and that the department of education is to take steps to facilitate its organization. In a letter to this writer, the Secretary General of the Department of Education said that "Aucune prière de caractère religieux n'est récitée ou autorisée dans les classes." Letter of Sept. 3, 1962, Genève. Likewise in the canton of Neuchâtel, there is no provision made for prayers. Letter to this writer from Le Chef du Département de l'Instruction Publique, Aug. 30, 1962, Neuchâtel.

25 Confirmed in interviews with the Fribourg Minister of Public Instruction, July 18 and Sept. 19, 1962.

26 See note 21 *supra*.

as to what formula is used is left to the individual teacher or principal.[27]

Article 6 of the federal constitution requires that the constitutions of the cantons and any amendments added thereto must be approved by the Confederation. The same article stipulates that approval should be given only if they "contain nothing contrary to the provisions of the Federal Constitution." Article 85, section 7, and article 102, sections 3 and 4, state that the two legislative bodies and the executive are the competent and necessary organs of government for awarding this "guarantee" or sanction.

Thus, as is evident, no one could press a suit on the ground that any of the several provisions in those cantonal constitutions mentioned above are unconstitutional on their face. In the United States this clearly could be done as a result of the holdings in *Engel v. Vitale*[28] and *McCollum v. Board of Education*.[29] Should someone in Switzerland urge that such provisions either constitute an establishment of religion or are inconsistent with separation of church and state, he would be told, first, that the Assembly as well as the Conseil Fédéral—the body hearing his appeal—had already approved the challenged provisions and, second, that the Conseil Fédéral had foreclosed the question by interpreting the "sovereignty" clause of article 3 so as to guarantee to the cantons the right to maintain state churches.[30] It would then be necessary to attack the provision, law, or practice by alleging that its application in the concrete case violated one of the "freedom of religion and conscience" clauses in the federal constitution. The following decisions of the Conseil Fédéral are pertinent, even though the factual situation in none parallels exactly that presented in *Engel*.

An 1887 ruling stated that a Catholic father could not be compelled to send his Catholic daughter to the class in religion given in the public primary school which she regularly attended.[31] School authorities had argued that since the parent was not being asked to send his child to the Protestant instruction, but only to classes in her own faith, there was no possibility that conscience or belief would be violated. But the Conseil Fédéral rebutted this, asserting that paragraphs one, two and three of article 49

27 It is usually "the Lord's Prayer, or some other such prayer which could not possibly offend any group." Interviews referred to in note 25 *supra*. See also note 44 *infra*.

28 370 U.S. 421 (1962).

29 333 U.S. 203 (1948).

30 See materials cited in notes 9-12 *supra*.

31 F.F. IV, 83 (1887).

were all infringed by such a demand; the father's authority over the religious education of his children under sixteen was absolute, and the state had no right to inquire into one's secret motives in this area. "If the State [canton] wants to provide for religious instruction in its schools and establishments of learning, it may do so only if it makes it absolutely optional."[32] On the other hand, if parents freely register their children for an optional religion course, then the children must attend. Thus, the Conseil Fédéral has upheld a fine imposed upon a father who permitted his child to skip classes in religion; the man retained the right to withdraw the child, but until he did so proper *ordre scolaire* could not countenance merely casual attendance.[33]

In another decision, the Conseil Fédéral held that article 49 was infringed by public school authorities when they wrote on the school certificate of a student that he "had been very negligent in the fulfillment of his religious duties."[34] It also has ruled that, even if the teaching is "non-confessional," the public schools cannot make it obligatory.[35] Does Bible history come under such a ban? This raises a highly interesting question of a substantive and jurisdictional nature. In 1891, the Conseil Fédéral—the only organ authorized to hear appeals in school matters—made a distinction: paragraphs one through three of article 49, it said, justified the demand made for exempting public school children from school prayers, religious exercises and catechism instruction, but not for excusing them from the class in Bible history.[36] How-

[32] *Id.* at 88. But, in 1930, the Tribunal Fédéral was presented with this case: a child was handed over to the guardianship of the canton of Geneva, after her parents had been stripped of their parental rights. The teacher in the state institution, to which the child was entrusted, continued to raise her in the faith of her parents, with their consent. Subsequently they protested against this religious education, but the Tribunal Fédéral rejected their appeal on the ground that the guardian now had the parental right in education. Meeting an additional protest, it said: "As to the argument drawn from the fact that the young Irene was placed in a State establishment whose essence is to be neutral in the matter of religion, the supervising authority could not restrain it. . . . In a desire to apply this principle, the conclusion would be reached that a child placed in an establishment of this kind should not receive any religious education, a thing in itself contrary to the neutrality of the state, and this even in opposition to the will of parents. This is inadmissible." Lany v. Genève, 53 LA SEMAINE JUDICIAIRE 138, 141 (1930). Not reported in *Feuille Fédérale.*

[33] F.F. I, 474 (1893); F.F. II, 334 (1888); F.F. IV, 92 (1887).

[34] F.F. II, 733 (1882).

[35] F.F. II, 630 (1880).

[36] F.F. II, 349, 552 (1892); F.F. II, 286, 290-91 (1891). Bible study was here judged to be a course in history. In 1962 a lower federal court in the United States held unconstitutional a Pennsylvania statute providing for the reading, without comment, of ten verses from the Bible in school. Schempp v. School Dist., 201 F. Supp. 815 (E.D. Pa.), *prob. juris. noted,* 371 U.S. 807 (1962). This, unlike the Swiss cases, is not a Bible *study* case. Rather, the reading of the verses upon the opening of each class day seems similar to the reciting of the prayer in the *Engel* case, except, of course, that no state official in

ever, it is the Tribunal Fédéral which has jurisdiction over appeals involving paragraph six of article 49.[37] This states that "no one is obliged to pay taxes devoted especially to the special expenses of a ritual of a religious community to which he does not belong." In a case involving this paragraph, the Tribunal Fédéral declared it could not sustain the above distinction previously made by the Conseil Fédéral.[38] Accordingly, it would seem that a taxpayer may refuse to pay taxes for the purchase of Bible history books, but that his child might be compelled to attend the Bible history class.[39] Article 27, paragraph three, provides that "the public schools shall be such that they may be attended by adherents of all religious sects without any offense to their freedom of conscience or belief." Nonetheless, a student may be compelled to take military training at school, since article 49, paragraph five, stipulates that "no one is released from performance of his civil duties by reason of his religious beliefs."[40]

In some communes, religious sisters are hired to teach in the public primary schools. It has been argued before the Conseil Fédéral that their very presence in the classroom, in distinctive garb and with refined and modest comportment, makes them effective propagandists for a particular faith; and, moreover, that their own beliefs would inevitably penetrate even their courses in secular subjects.[41] The Conseil Fédéral, while admitting the strong possibility of these allegations, nonetheless dismissed the appeal, which, it said, was based on "apprehensions" rather than on "real tangible facts" that religious conscience was put in jeopardy in the public schools. Only in the face of proof to the contrary in a concrete case would the federal authority have the right to intervene.[42] In another similar case the Conseil Fédéral

Pennsylvania has composed the ten Bible verses selected for reading. See text at and notes 21-22 *supra* for the law in the canton of Vaud on this practice in the public schools.

37 LOI FÉDÉRALE D'ORGANISATION JUDICIAIRE, Arts. 84(a), 125, 126(a) (1943).

38 RECUEIL OFFICIEL DES ARRÊTS DU TRIBUNAL FÉDÉRAL XXIII, 1361, 1369 (1897). Note that the case did not involve the school as such, *i.e.*, its organization or course of studies, but only a taxpayer. See note 42 *infra*.

39 Today this seems highly theoretical. From the school programs surveyed for the present study, and from interviews made, this writer concludes that the cantonal authorities are most solicitous not to compel a child to attend any kind of a religious or Bible history class.

40 F.F. II, 86 (1878). *Cf.* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).

41 F.F. I, 411 (1880).

42 In this case, as in the "Bible" cases treated above, there arose the question of whether the appellants could be compelled to pay taxes for the teachers' salaries. The Conseil Fédéral contended that this was under the jurisdiction of the Tribunal Fédéral. *Id.* at 430. The latter never ruled on the point. The practical interpretation today is that article 49 permits the hiring of religious sisters as teachers—as long as they are not administrators of the school—and the paying of their salaries with tax money. Interview with the Fribourg Minister of Public Education, Sept. 19, 1962.

stressed the point that article 27 aimed at eliminating *teaching* which infringed religious liberty, not *persons* who might possibly do so.[43]

Although prayers are said in the public schools in many cantons, the practice never appears to have provoked parents to ask for a ruling on the matter from the federal authorities.[44] However, the principles set forth in the several cases cited above are clear indications as to how the Conseil Fédéral would rule were an appeal made from the action of a school board of one of the cantons in authorizing a practice similar to that condemned in *Engel v. Vitale*. These principles, as well as those invoked by the Supreme Court of the United States in similar cases, will be seen in an interesting light if one takes a synoptic view of the pertinent constitutional history of the two countries.

When the American Constitution was drafted in 1789, it contained few restrictions on the states relative to the laws they might pass in the area of civil and personal liberties. The Bill of Rights, adopted in 1791, was clearly meant to bind the central government only.[45] It is interesting that, among the several proposed amendments which Madison presented to Congress in 1789, one provided: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[46] Congress rejected even this limited interference with the states' authority in religious matters. But at the same time it approved the amendment which forbade Congress to: (1) establish a national religion, (2) disestablish state churches, and (3) curtail the free exercise of religion. Thus, as late as 1845, and for many years thereafter, the prevailing doctrine was that set down by the Supreme Court in *Permoli v. Municipality of New Orleans*: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws."[47]

43 F.F. II, 84 (1878).

44 In Vaud and in Fribourg where prayers are said in the public schools, it is not clear whether the school authorities authorize a definite formula to be used. See notes 21-22, 27 *supra*. In the *Engel* case the school board had directed one particular prayer to be recited, and this fact seems to have been the principal cause for the Court's adverse decision. 370 U.S. at 425. Does the decision permit prayers if chosen democratically by the children by majority vote or if the selection is made by the teachers? In the latter case, clearly it would be an agent of the state that would "impose" the prayer. In the former situation, the teacher would certainly have to sanction the students' choice, eliminate prayers clearly offensive, and ultimately "impose" the prayer thus "authorized" on an unwilling minority.

45 Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833).

46 ANDERSON, *op. cit. supra* note 6, at 249; 1 ANNALS OF CONG. 450 (1834) [1789-1791].

47 44 U.S. (3 How.) 589, 609 (1845).

The original Swiss Constitution, as it came from the hands of its creators in 1848, was, in pertinent part, similar,[48] except that it armed the federal government somewhat more effectively for action against cantonal laws restricting religious liberty. Article 48 thus read: "All the cantons are obliged to treat the citizens of one of the other States of the Confederation as citizens of their own State, in the matter of law and in all that concerns juridic procedure."[49] Article 41—without the several qualifying paragraphs—stipulated: "The Confederation guarantees to every Swiss of one of the Christian confessions, the right to settle freely throughout the whole extent of Swiss territory, in conformity with the following dispositions. . . ."[50] (These "dispositions" are here omitted.) Article 44 stated that "the free exercise of worship for the recognized Christian religions is guaranteed throughout the Confederation."[51] Such power of intervention into the states' affairs was never entrusted to the federal government by the drafters of the American Constitution nor by those who ratified the Bill of Rights. However, the more explicit guarantees now included in articles 27 and 49 of the present Swiss Constitution were not included in the 1848 document. It was not until the revision of 1874 that the Constitution authorized the central government to intervene in school matters and in the general area of church-state relations if the cantons should infringe freedom of conscience and belief.[52]

48 The "sovereignty" clause in article 3, like the tenth amendment, encompasses by implication the right to establish state churches. This right was spelled out in explicit language in the first amendment to the American Constitution; that is, one of the principal motives of those demanding the "respecting" clause was a desire to obtain a guarantee that the states could continue to legislate freely in the church-state area. The debates in the state ratifying conventions in 1788 are clear on this point. James Iredell of North Carolina (a U.S. Supreme Court Justice, 1790-1799) seems to have summarized the aspirations of most delegates who addressed themselves to the matter: "Each state must be left to the operation of its own principles." 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 244 (Elliott ed. 1861). See also 1 *id.* 44, 80, 87, 100, 114, 118, 362; 1 ANNALS OF CONG. 431-42, 450, 600-65, 729, 730 (1834) [1789-1791].

49 See note 51 *infra*. This guarantee is now in articles 60 and 61.

50 This "freedom of movement" or "freedom of settlement" guarantee is now in article 45, with the religion qualification omitted, and with certain other changes. Because of the many exceptions and because the cantons and the communes still retain considerable authority in the matter, the freedom granted in article 45 is much less complete than in the United States. See Edwards v. California, 314 U.S. 160 (1941).

51 Note the similarity between articles 44 and 45 and the "full faith and credit" clause and the "privileges and immunities" clause in article IV of the American Constitution. For an interpretation of the latter, see The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1875); Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

52 For a history of the revision, see RAPPARD, LA CONSTITUTION FÉDÉRALE DE LA SUISSE 1848-1948, at 271-89 (1948); RAPPARD, L'INDIVIDU ET L'ETAT (1936). For a discussion of the addition of article 49, see CLERC, LES PRINCIPES DE LA LIBERTÉ RELIGIEUSE EN DROIT PUBLIC SUISSE 1-62 (1937). Article 50, added in 1874, grants freedom of worship to all. Thus the restriction in article 44 of the 1848 Constitution no longer exists.

Almost contemporaneously, the fourteenth amendment was added to the American Constitution, which, like the above-mentioned revisions in the Swiss Constitution, empowered the federal government to protect individuals in the states against abuses of authority by their state or local governments.[53] An additional striking parallel will appear if section 5 of this amendment[54] is juxtaposed with the final paragraphs of articles 27 and 49 of the Swiss Constitution.[55] In each instance, the wording strongly suggests that legislation by the appropriate branches of the respective countries' governments was envisaged as the proper initial step toward implementation of the constitutional "freedom" guarantees. However, in neither country has such a legislative achievement been realized.[56] Thus, in Switzerland, enforcement of the guarantees against non-complying cantons can be demanded only after an appeal either to the Conseil Fédéral or to the Tribunal Fédéral[57] by some aggrieved individual. In the United States, even without implementing legislation, the federal courts regularly entertain such appeals, and, if need be, bequeath enforcement duties to the executive.[58]

A final point, one of transcendent importance, concerns "establishment" vis-à-vis the "freedom" guarantees in the two constitutions here under scrutiny. The federal constitution of Switzerland, as the above discussion indicates, is replete with detailed "liberty" provisions which concern the schools and the churches. But it does not prohibit the cantons from establishing official state religions. On the contrary, the "sovereignty" article guarantees to them the right to maintain a union between state and church;[59] and, by reason of the same guarantee, the Confederation is forbidden to establish a national church. As mentioned previously,[60] the Constitution of the United States originally presented an

53 The pertinent part of the fourteenth amendment reads: "No state may make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deny to any person life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

54 "Congress shall have the power to enforce, by appropriate legislation, the above provisions of this Amendment."

55 Article 27, paragraph four: "The Confederation will take the necessary measures against cantons which fail to fulfill these obligations." Article 49, paragraph six, sentence two: "The exact execution of this principle is reserved to federal legislation."

56 See note 19 *supra*.

57 Depending upon the type of case. See notes 14, 37, 38, and 42 *supra*, and accompanying text.

58 Supreme Court decisions are the "supreme law of the land," and article II states that the President "shall see that the laws are faithfully observed."

59 See notes 9-12, 26 *supra*, and accompanying text.

60 See notes 45-48 *supra*.

exact parallel to that of Switzerland in this regard. To what extent was the fourteenth amendment designed to rearrange this reservation of power? With reference to this amendment, the Supreme Court stated in 1922: "The Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence."[61] This language was, of course, meant to encompass all the guarantees in the Bill of Rights; nor was this interpretation novel, as previous decisions testify.[62] Subsequently, however, the Court has held that, by reason of the due process clause of the fourteenth amendment, all the guarantees of the first amendment are constitutionally protected against action by the states.[63]

Since the Court itself has rejected complete "incorporation,"[64] constitutional historians may find themselves somewhat uneasy over the theory of "selective assimilation."[65] It must, indeed, be

61 Prudential Ins. Co. v. Cheek, 259 U.S. 530, 538 (1922). See also *id.* at 543.

62 Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321, 327 (1868); United States v. Cruikshank, 92 U.S. 542, 552 (1875). Hale v. Everett, 53 N.H. 9 (1868) is particularly pertinent, since the sole question in that case concerned a religious matter. Moreover, New Hampshire had approved the fourteenth amendment in July 1866, and it became part of the Constitution just five months before the *Hale* decision. Nonetheless, there is not a single reference to this amendment, even in the 143-page opinion of the dissenting judge who supported the heterodox minister. The majority opinion of 83 pages mentioned the first amendment only once, and then to prove that "the whole power over the subject of religion is left exclusively to the state governments." *Id.* at 124.

63 Cantwell v. Connecticut, 310 U.S. 296 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925).

64 Adamson v. California, 332 U.S. 46, 53 (1947).

65 Palko v. Connecticut, 302 U.S. 319 (1937). As regards the "assimilation" or "incorporation" theory, the following discussion may prove helpful. The original Constitution did not—except in a few instances—authorize the federal government to protect the personal liberty of an individual against abuses by his state government. Nor did the Bill of Rights, adopted in 1791, change this arrangement, since it related only to action by the federal government. But the fourteenth amendment was intended to bring the individual definitely under the protective arm of the central government's power. Some have argued that its purpose was to make all the guarantees of the Bill of Rights binding upon the states. However, the majority of the Supreme Court has consistently held that only "selected" guarantees are made applicable under the fourteenth amendment, specifically by the due process clause. Accordingly, over the years, the Court has "assimilated" or "incorporated" by this "selective" process only those liberties or rights which it has deemed to be most basic or "implicit in the concept of ordered liberty." Thus, it has held that all the freedoms of the first amendment, being fundamental freedoms, will be protected against state infringement by the federal government. On the other hand, the right to a trial by jury in a criminal case need not be offered by the states, since it is not considered to be of so basic a character. In other words, a fair trial can be had and justice and liberty preserved even if jury trials are not provided. The experience of other highly civilized and democratic nations prove this point, and the Court has indicated clearly in several opinions that it takes such experience into account when applying the principle of "selective assimilation." But liberty could not long endure if the states denied freedom of speech, as history both remote and near so tragically demonstrates. Thus, it is the *quality* of each guarantee in the Bill of Rights which the Court examines before determining whether the state governments must

admitted that historians can amass convincing arguments against any incorporation.[66] The thrust of logic is equally forceful: incorporate *all* the freedoms of the Bill of Rights or incorporate none. What the drafters of the fourteenth amendment really intended, and what the states thought they had ratified, are questions that probably will never be answered with complete satisfaction. Nonetheless, the *Palko* case opinion of Mr. Justice Cardozo does seem to grasp the general spirit of the era and to capture the hopes and aspirations of the people at that time.[67]

Fortunately, these thorny problems which concern the assimilation of the *liberty* clauses of the first eight amendments need not be touched in this study. But the *establishment* clause is most pertinent here, and the questions relating to its assimilation must be considered. Since that clause does not in itself contain a "freedom" provision,[68] and since religious establishments can and do exist without infringement of religious liberty, there would appear to be no logical reason whatsoever for its incorporation into the fourteenth amendment. Consequently, several competent constitutional lawyers have urged that the Court abandon the assimilation of this provision of the first amendment,[69] and further elaboration of this crucial point seems desirable. Since the Court has rejected the theory of "complete incorporation," the states are not bound by any particular provision of the Bill of Rights unless failure to abide by such provision would be a denial of "liberty without due process of law." Moreover, the freedom involved, the Court has held, must be a basic freedom, that is, one "implicit

extend it to its people. Proponents of "total incorporation" would make every one of the guarantees applicable regardless of its relative value in the scheme of ordered liberty. On this general matter, see, *e.g.*, Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Hebert v. Louisiana, 272 U.S. 312 (1926); Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581 (1900). See also notes 62 and 63 *supra*.

66 Professor Stanley Morrison concluded that there was an "absence of any adequate support for the incorporation theory." Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 173 (1949).

67 Professor Charles Fairman, who rejects the theory of complete incorporation, has written this of the *Palko* decision: "Cardozo's gloss on the due process clause . . . comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause." Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949).

68 To this writer it seems appropriate to note that the constitutions of Russia, Byelorussia, Bulgaria, Ukraine, Outer Mongolia, Hungary, Poland, and Yugoslavia all carry "separation" or "non-establishment" provisions. This underscores the fact that such provisions do not in themselves secure religious freedom, especially where governments are actively attempting to destroy any established religion.

69 See, *e.g.*, Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 19 (1949); Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U.L.Q. 497 (1942); Kauper, *The First Ten Amendments*, 37 A.B.A.J. 717 (1951); Note, 67 HARV. L. REV. 1016 (1954).

in the concept of ordered liberty,"[70] before it qualifies for incorporation. The guarantee of religious freedom clearly fits within this definition. But in *Engel v. Vitale* the Supreme Court seemingly decided that states are forbidden to engage in any practice which the Court determines to be contrary to the establishment clause, *even if* the practice should leave religious freedom unimpaired.[71] Thus, it appears that the Court is now justifying the incorporation of the non-establishment provision without reference to the "ordered liberty" principle, which, nonetheless, is the only justification which its majority has accepted for assimilating any clause of the Bill of Rights.

Turning to Switzerland, there at least seventeen cantons have state religions, and the other cantons all authorize practices, such as religious instruction or prayers in the public schools, which the Supreme Court of the United States has forbidden in America. England has a national church, and the Lutheran Church is established in Denmark, Finland, Iceland, Norway, and Sweden. The people in these countries would be surprised, probably quite indignant, if informed that, according to the Supreme Court's formula, all of these practices and church-state arrangements are in *themselves* contrary to what is "implicit in the concept of ordered liberty." Yet, the logic of the *Engel* decision, read in the light of the *Palko* principle, seemingly compels such a conclusion.

The chink in the Court's armor will be further exposed by reflection upon this not impossible situation: If in America one state or one community were to decide by *unanimous* vote to permit prayers and religious instruction in its public schools, would the state or community be flouting the *Engel* ruling? Would it be acting contrary to what is "implicit in the concept of ordered liberty"? If so, it is fair to ask, *what* concept and *whose* liberty? Assuming that all the school money involved came exclusively from the state or community, there would be no aggrieved person to carry a legal suit to the courts. Nonetheless, would not the practice be contrary to the supreme law of the land as now interpreted by the Court? Even without orders from the judiciary, would not the state or community be bound in conscience to perform a heroic act of collective self-abnegation, and to abandon such school programs? Of course, this action would deny freedom to one hundred percent of the people (in the case of this hypothetical), but such sacrifice would be compelled by the principle

70 Palko v. Connecticut, 302 U.S. 319, 325 (1937).
71 See note 3 *supra*.

that somehow a basic concept of "ordered liberty" has been compromised. It is the opinion of this writer that these questions are appropriate and do help to underscore the weakness in the *Engel* decision.

It would seem, then, that to be logical and to maintain consistency in constitutional principles, the Court should retreat from the position it has taken, and base its decisions in state cases involving religious matters solely on the freedom clause of the first amendment. As to this present study in comparative law, it is interesting to note that adoption of this approach would restore the exact parallel—as concerns religious matters—between the present federal constitution of Switzerland and that of the United States prior to the latter-day incorporation of the non-establishment principle. That is, the federal government in each country would continue to be the final arbiter in disputes regarding religious freedom and the guardian of the religious liberty of all individuals within the states or cantons. It would, however, refrain from interfering with a multitude of possible experiments in church-state cooperation, which judges may not like or might even deem attributes of religious establishments, but which recommend themselves to the people as likely solutions to disturbing problems in a disturbed and changing world. In Switzerland, as indicated above, most cantons do have official churches. Although the Swiss people seem convinced that such arrangements enlarge rather than shrink religious liberty, there is little likelihood that the American states would or ever should follow the Swiss in this regard, even if they were released from federal control in the matter; their own state constitutions stand as barriers against such eventuality.

If these suggestions as to incorporation were accepted, what would be the practical effect in such cases as *Engel v. Vitale* and *McCollum v. Board of Education*? First, for plaintiffs in these cases, once the "wall" argument was removed, they would have to take a firm position on the only piece of constitutional terrain left to them—that provided by the freedom clause of the first amendment. This would force all parties in a dispute to focus their attention more sharply on the only issue of religious freedom which is central to the whole problem. Secondly, abandonment of incorporation of the establishment clause would free the Court from "the tyranny of a label"[72] which frequently results in preoccupa-

[72] Mr. Justice Cardozo once observed that "a fertile source of perversion in Constitutional theory is the tyranny of labels." Snyder v. Massachusetts, 291 U.S. 97, 114 (1934). In a later case, he wrote: "The tyranny of labels . . . must not lead us to leap

tion with a mere abstraction while promoting inattention to questions of substantial justice in the concrete.[73] In the past, social justice and economic freedom for the American people were victims of such unrealistic conceptualism on the part of the judiciary.[74] The present Supreme Court seems equally in bondage to conceptual thinking.[75] The American people are currently beset by serious problems in areas where education and religion meet. The Court lends them no aid in solving these problems, nor is the Court itself "responsibly aided by the uncritical invocation of metaphors like 'the wall of separation.' "[76]

to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." Palko v. Connecticut, 302 U.S. 319, 323 (1937). This quotation seems particularly applicable to the word "establishment."

73 A comment of Professor Freund is apposite: "If the Court has on the whole been more successful in finding serviceable accommodations under the Commerce Clause between a national free market and the claims of local welfare than under the First Amendment between liberty of the mind and the claims of public order, one reason may be the more empiric, particularistic approach that has generally characterized the performance of the former role." Freund, *Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 97 (1952).

74 For instance, the aphorism "freedom of contract," which, as applied by past Courts, meant actually a denial of freedom to millions of workers. Lochner v. New York, 198 U.S. 45 (1905). Likewise, the sophism "the power to tax is the power to destroy." In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819), Mr. Chief Justice Marshall said that "the power to tax involves the power to destroy." Subsequent Courts interpreted this as "the power to tax *is* the power to destroy," and then, by a doctrinaire application, built up a monstrous intergovernmental tax immunity doctrine relating to both state and federal government. This dried up revenue resources, threw an added burden on taxpayers, and often put private business at an unjust disadvantage with certain government enterprises. Justices Holmes, Brandeis, and Stone tried for years to get the Court to look at the *facts* in each case before deciding whether or not the tax *actually* destroyed. The power to legislate also involves the power to destroy, but the function of courts and of democratic institutions is to see that no *particular* law does in fact destroy. Mr. Justice Holmes observed, "[T]he power to tax is not the power to destroy while this Court sits." Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). The Court finally abandoned the sophistic truism in Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

75 In addition to the metaphor "a wall of separation," the "three pence only" argument of Mr. Justice Black seems like another manifestation of unrealistic thinking. Engel v. Vitale, 370 U.S. at 436. It is true that a person *might* possibly, in some countries and in some eras, be forced to conform ultimately to a religious establishment by "the same authority" that taxed him, in the beginning, "three pence only." But the *facts* are that, in America, such religious coercion has *not* followed, even though ever since 1789 the federal government has been "forcing" people to contribute tax money for chaplains, for prayers, and for chapels. If Holmes were alive, perhaps his sense of realism would prompt him to say "neither prayer nor pence will force religious conformity while this Court sits." See note 74 *supra*. See notes 42, 43 *supra*, and accompanying text, for examples of how authorities in Switzerland examine the *facts* of each case in true Holmesian fashion rather than apply some general doctrinaire formula.

76 Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).